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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,

Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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OPINION BELOW

The opinion of the Colorado Supreme Court has been attached, as Appendix A, to the Petition for Writ of Certiorari filed by the petitioner in the instant case.

JURISDICTION

This Court is without jurisdiction to review the decision of the Colorado Supreme Court in the case of *The State of Colorado v. Antonio Guadalupe Nunez.*

The decision by the Colorado Supreme Court, in the instant case, is governed and controlled by a decision of the same court in the *People v. Dailey,* 639 P. 2d 1068 (1982). The relationship between *Dailey* and the instant case is also reflected in the Petition itself. (See pages 6-9 of Petition for Writ of Certiorari.) Therefore, in order to ascertain whether this court has jurisdiction herein, the underlying basis and authority for the decision in *Dailey* must be closely examined in the light of case law in this area.

This Court has consistently observed that state courts are entitled to interpret their own constitutions. "It is fundamental that state courts be left free and unfettered by us in interpreting their own constitutions." *Minnesota v. National Tea Company,* 309 U. S. 551, 557 (1940); *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U. S. 861 (1974). It is incumbent upon the petitioner to show that there is no independent or adequate state ground for the decision it seeks to challenge in this Court. In the absence of such a showing, the decision of this Court would result in "nothing more than an advisory opinion". *Herb v. Pitcairn,* 324 U. S. 117, 126 (1945).

The fact that a given State Supreme Court has cited federal authority in reaching its decision, does not necessarily lead to the conclusion that the court has not independently evaluated and applied the provisions of its own

constitution. *Jankovich v. Indiana Toll Road Commission,* 379 U. S. 487 (1965).

A close reading of the decision in *Dailey,* indicates it was clearly based upon independent state grounds. The basis for this observation will be set forth more fully in the section of the instant pleading entitled "Reasons for Denying the Writ".

Should this court determine, however, that it is unclear whether the Colorado Supreme Court based its opinion on its own constitution, the proper approach would be to remand this case to the Colorado Supreme Court for further proceedings and clarification of its opinion. *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U. S. 861 (1974); *California v. Krivda,* 409 U. S. 33 (1932); *Mental Hygiene Department v. Krichner,* 380 U. S. 194 (1965).

STATEMENT OF THE CASE

On November 7, 1981, members of the Denver Police Department obtained a search warrant to search the premises and motor vehicles located at 8690 Norwich Street, Adams County, Colorado. The search warrant was based upon information from three confidential informants. The search warrant was executed on November 7, 1981, and during the execution of same 15 balloons were allegedly found in the pocket of the defendant Mr. Nunez. Inside the balloons, a substance was allegedly discovered which was later analyzed and found to be heroin. Based upon the evidence recovered from the search of Mr. Nunez's

pockets, the defendant was charged in a one count information with possession of a controlled substance, Schedule I in violation of C. R. S. 1973, § 12-22-3309 and § 18-18-105(2) (a) as amended.

The defendant was arraigned on February 2, 1982, and on February 25, 1982, the defendant filed the following motions: Motion to Suppress, Motion to Disclose Informant, Motion for Disclosure of Deals and/or Compensation. On September 9, 1982, a hearing was held on the defendant's motions.

It must be noted that the only motion ever adjudicated, *on the merits,* was the Motion to Disclose Informant. At the beginning of the September 9, 1982, hearing, counsel for the defendant had requested adjudication of this motion first so, in the event that it was granted, he could subpoena the confidential informant for the hearing on the merits of the Motion to Suppress.

The court never reached the defendant's Motion to Suppress on the merits. Rather, this motion was granted on October 12, 1982, after the district attorney had informed the court that he would not disclose the identity of the confidential informant despite being ordered to do so by the Trial Court Judge on October 7, 1982. On that date, the Trial Court Judge entered written Findings of Fact, Conclusions of Law, and Order regarding the Motion for Disclosure of Informant in which he granted same. On October 18, 1982, the appellant filed their Notice of Interlocutory Appeal pursuant to Colorado Appellate Rules 4.1.

The statement made by the petitioner in the "Statement of the Case" portion of its Petition for Writ of Cer-

tiorari, to wit: that defense counsel conceded that the credibility of the affiant of the search warrant, Sgt. Denovolis was not at issue, mischaracterizes the proceedings before the Trial Court Judge. The statement alluded to by the petitioner was made in the context of an offer of proof and was clarified at a later point when counsel for the defendant stated that disclosure of the informant was necessary in order to prove the affiant's intentional misstatements or reckless disregard of the truth in preparing the affidavit. (See portion of instant pleading entitled "Reasons for Denying the Writ".)

REASONS FOR DENYING THE WRIT

In its Petition for Writ of Certiorari, the petitioner misstates the issue presented by the instant case. The decision of the Colorado Supreme Court does not state that a defendant may successfully challenge the veracity of an affidavit, given in support of a search warrant, by proving that the informant gave false information or is incredible. Rather, the issue presented by the instant case is: To have an adequate opportunity to present evidence in support of a veracity challenge, what showing must a defendant make in order to have the identity of a confidential informant disclosed?

In the instant case, similar to the facts presented in the *Dailey* case, the respondent sought to challenge the affidavit that formed the basis for the granting of a search warrant. The defendant was moving to strike certain allegations contained in the affidavit, based upon their

lack of veracity and trustworthiness. The respondent also argued that should these allegations be stricken, the affidavit was insufficient to establish probable cause.

The *Dailey* case, which governs the decision in the instant case, does not stand for the proposition that a defendant may successfully strike allegations from an affidavit during the course of a veracity challenge, based on the *informant's* truthfulness or credibility. In fact, the Colorado Supreme Court considered such a situation and declined to rule on it.

> We do not agree with the trial court's assumption that all false information in an affidavit for search warrant must be stricken without regard to the source of the error, before determining its (the affidavit) sufficiency to establish probable cause. If the error resulted from perjury or reckless disregard for the truth on the part of the affiant-officer, the Fourth Amendment requires that the incorrect statements be stricken. *Frank v. Delaware, supra.* The errors, however, could have resulted from the informant's perjury or reckless disregard for the truth or from the negligence or good faith mistake of either the officer or the informant. Other sources of error can be imagined. *We consider it inadvisable to attempt to develop the consequences which would flow under the United States and Colorado Constitutions from each of the various possibilities as to the origin of the error.*

Dailey, 639 P. 2d at 1074. (Parenthesis and emphasis added.)

In addition to not even reaching the issue raised by the petitioner in its Petition for Writ of Certiorari, it is clear from this passage that the decision in the *Dailey*

case is predicated on both the United States *and* Colorado Constitutions.

In both the *Dailey* case and the instant case, therefore, the Colorado Supreme Court required a criminal defendant, in the context of a veracity challenge in a Motion to Suppress evidence, to prove that the affiant-officer committed perjury or was guilty of a reckless disregard for the truth. The issue raised in the *Dailey* case which was germane to the proceedings in the instant case is: Should a defendant, after making a proper showing, be able to obtain disclosure of the identity of an informant for the purpose of conducting a veracity challenge? In that regard, the Colorado Supreme Court, in *Dailey,* stated:

> As we have seen, the Fourth Amendment mandates an excision of an erroneous statement in an affidavit for search warrant if the defendant can show by a preponderance of the evidence that the error in the affidavit for search warrant was caused by an officer-affiant's perjury or reckless disregard for the truth. *Frank v. Delaware, supra.* In order to have a fair opportunity to carry this burden, where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information. Under these circumstances, if the defendant cannot learn the identity of the informant, he will be denied information essential to the merits of his suppression motion.

Dailey, 639 P. 2d at 1076.

In determining whether the identity of the informant should be disclosed for the purpose described above, the

Supreme Court of Colorado, in *Dailey*, prescribed the use of a balancing test. *Dailey*, 639 P. 2d at 1077.

The balancing test discussed in *Dailey* was further defined in a subsequent decision by the Colorado Supreme Court. In *People v. Bueno*, 646 P. 2d 931 (1982), another decision relied upon as authority in the instant case, the Colorado Supreme Court stated that disclosure of an informant is *not* an automatic process. Rather, "a defendant seeking disclosure must make an initial showing that the informant will provide information essential to the merits of his suppression ruling". *Bueno*, 646 P. 2d at 935. The court went on to describe the type of showing that needs to be made:

> Thus, a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informer does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as probable cause for an arrest or search. Disclosure in such cases not only safeguards the defendant's right to be free from an unlawful arrest or search but also protects the judicial process itself against abuse by false affidavit of testimony.

Bueno at 936.

It is left to the sound discretion of a trial judge to employ this standard in determining whether the proper showing has been made to require the disclosure of the informer's identity for the purpose of *conducting* the veracity challenge to the affidavit. *Dailey*, 639 P. 2d at 1077. In the instant case, there has been no allegation that the trial court judge did not apply the proper stand-

ard or that his decision constituted an abuse of discretion or was unsupported by the evidence.

As was indicated earlier, the trial court never reached the defendant's veracity challenge in the context of his Motion to Suppress. Rather, the prosecutor refused to divulge the identity of the confidential informant and therefore the suppression hearing never went forward. On a number of occasions, the petitioner asserts that counsel for the respondent and the trial court judge stated that the credibility of the affiant-officer was not an issue. This argument has been raised by the petitioner at every level of the proceedings and has not been accepted by any judicial body. This allegation simply does not comport with the facts.

In the first instance, the statements attributed to counsel for the respondent were made in the context of an offer of proof. At the time the statement was made, the defense counsel was cut-off by the court and not allowed to finish his train of thought.

After defense counsel was cut-off, the District Attorney made an argument similar to the one advanced herein, to wit: that the respondent is not challenging the credibility of the affiant-officer. Immediately after the district attorney raised this issue, defense counsel clarified this misunderstanding regarding his earlier statement. He indicated that, *at this particular point in time,* the defendant could only carry his burden on the issue of the recklessness of the affiant but needed the disclosure of the informant in order to prove an intentional misstatement by the affiant or to further support the claim regarding his reckless disregard of the truth. This posi-

tion taken by counsel for the respondent was reiterated at further points in the hearing.

The sentiment expressed by defense counsel, that he needed disclosure of the informant in order to further document his claim regarding the affiant's misstatements or reckless disregard of the truth, are fully consistent with the concerns expressed by the court in *Dailey* regarding the need of a defendant to have this information in order to conduct his veracity challenge.

In dicta in the *Dailey* case, the Colorado Supreme Court discussed the consistency of its holding with decisions rendered by federal courts interpreting the United States Constitution.

> *Frank v. Delaware, supra,* prescribes the circumstances under which a veracity hearing must be held in order to comply with the Fourth Amendment. It does not prohibit such hearings based upon lesser threshold showings nor of course does it treat the question whether our state constitution requires such a hearing upon some lesser showing of probable merit. See Colorado Const. Art. II, § VII. We consider it appropriate that the defendant show some good faith basis in fact to question the accuracy of an affidavit for search warrant before a veracity hearing may be held.

Dailey, supra, at 1074.

Even though the Colorado Supreme Court's holding in *Dailey* and the instant case did not alter the holding in *Frank v. Delaware,* it is clear that the court's entire consideration of this issue was based, in significant part, upon an interpretation of the Colorado Constitution.

CONCLUSION

Based upon the arguments contained herein, this Court does not have jurisdiction to hear the instant case since the decision rendered below was based upon independent state grounds. Furthermore, the decision of the Colorado Supreme Court is not in variance with case law set forth by this Court and therefore the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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